

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

**FELKER BROTHERS CORPORATION
Employer**

and

Case 26-RC-8484

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Felker Brothers Corporation, manufactures stainless steel pipe at its Glasgow, Kentucky facility. The Petitioner, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The Petitioner seeks to represent a unit of approximately 38 or 39 full-time production, maintenance, and shipping employees at the Employer's Glasgow facility. Following a hearing before a hearing officer of the Board, both parties filed a brief with me.

The sole issue raised at the hearing concerns the supervisory status of David Duvall, second shift work leader in the shipping department. The Employer contends that Duvall is a supervisor as defined in Section 2(11) of the Act, and is

therefore ineligible for inclusion in the petitioned-for unit. The Petitioner asserts that Duvall is not a supervisor as he does not use independent judgment in performing his daily activities, and therefore should be included in the petitioned-for unit. At hearing, the Employer called one witness to testify, Human Resources Manager Marsha Newport. The Petitioner did not call any witnesses.

I have considered the evidence presented at the hearing, the relevant case law and the arguments advanced by the parties. As discussed below, I find that David Duvall is not a supervisor within the meaning of Section 2(11) of the Act and is properly included in the petitioned-for unit. To provide a context for my decision and discussion of this issue, I will first provide an overview of the Employer's operations followed by a review of the applicable legal standards for determining supervisory status. Then, I will discuss the facts and my analysis of those facts.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer manufactures stainless steel pipe from 2 to 24 inches in diameter, normally 20 feet in length. The pipe is manufactured in either the batch mill, which uses steel coil, or one of four tube mills, which use flat sheet stock. Next, the pipe is forwarded to the pickling department where it is dipped into a tank of acid and water for cleaning. The pipe is then removed, sprayed with a water hose, dipped in clear water, and rinsed. Next, the pipe is lined-marked with an inkjet printer and sent outside to the shipping yard. When it is time to be shipped, the pipe is transported from the shipping yard to the inside of the facility where it is loaded onto flatbed trucks for delivery.

The Employer operates three shifts with about 38 or 39 full-time employees in its production, shipping and maintenance departments who are under the overall supervision of Plant Manager Jim Price. The first shift operates from 6:45 a.m. to 2:45 p.m. with about 23 full-time employees; the second shift operates from 2:45 p.m. to 10:45 p.m. with about 13 or 14 full-time employees and one temporary employee; and the third shift operates from 10:45 p.m. to 6:45 a.m. with two full-time employees. Although the precise number is not clear, some first and second shift employees work a 4-day, 10-hour schedule. Those on the first shift start two hours earlier, at 4:45 a.m., and those on the second shift end two hours later, at 12:45 a.m. In addition, during the last week of the month, all shipping department employees work 10-hour shifts.

The shipping department, where Duvall works, operates only on first and second shifts. On the first shift, Shipping Supervisor Mark Foster and his assistant, Kim Bartley, both stipulated to be Section 2(11) supervisors, are in charge of the shipping department, which has four employees. Foster and Bartley generally leave at about 4 or 4:30 p.m. each day.

On the second shift, the shipping department does not employ anyone with the title of supervisor from 4 or 4:30 p.m. until the second shift ends at 10:45 p.m. However, second shift Production Supervisor Donnie Cowles, a stipulated supervisor, is present throughout the second shift.

Duvall and three employees work in the shipping department on the second shift. Two of these employees, Joe Martin and Joe Taylor, are regular full-time employees. The third employee, Todd Hall, is a temporary worker. All four

individuals are classified as utility operators. Because Duvall has additional “work leader” responsibilities after first shift Shipping Supervisor Foster and his assistant, Bartley, leave for the day, the Employer considers Duvall to be a utility operator with work leader responsibilities.¹ Duvall has been a work leader since about 2002. He is paid an additional 5 percent for the hours in which he serves as a work leader.² He does not get the additional pay for the hours he works when Foster or Bartley is also present.

The third shift, consisting solely of two employees in the pickling department, is supervised by Acting Supervisor Scott Combs, who was stipulated to be a supervisor within the meaning of Section 2(11) of the Act.

II. APPLICABLE LEGAL STANDARD

Section 2(11) of the Act defines “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” To qualify as a supervisor, it is not necessary that an individual possess all of the powers listed in Section 2(11). Rather, the possession of any one of them is sufficient to establish supervisory status, provided the exercise of authority

¹ For convenience, he will be referred to simply as a work leader.

² In May 2003, Duvall was paid \$12.32 as a utility operator (\$12.07 plus a \$.25 shift premium) and about \$12.92 as a work leader. The record does not establish if that is his current rate of pay.

involves the use of independent judgment and is not merely routine or clerical in nature. *Mountaineer Park, Inc.*, 343 NLRB No. 135, slip op. at 2 (2004), citing *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99, slip op. at 2 (2003). The burden of proving supervisory status rests on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). The Board will refrain from construing supervisory status too broadly, as the consequence of doing so is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*, 308 NLRB 101 (1992). In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen...and other minor supervisory employees." *Id.* at 102 (quoting S.Rep.No. 105, 80th Con., 1 Sess. 4 (1947)).

III. FACTS AND ANALYSIS

The Employer contends that Duvall is a supervisor because he responsibly directs work, effectively recommends persons for hire, and effectively recommends discipline. Each of those factors is discussed below, as well as evidence of granting time off and evidence that is considered secondary indicia of supervisory authority.

A. Direction and Assignment of Work

Each afternoon at the beginning of the second shift at 2:45 p.m., a meeting, referred to as a huddle, is conducted in the break room with the first shift Shipping Supervisor Mark Foster or his assistant Kim Bartley, second shift Production Supervisor Donnie Cowles, and second shift production and shipping employees,

including Duvall.³ The purpose of the meeting is to give employees work assignments for the day. At the end of the meeting, production employees leave and Foster or Bartley meets with the shipping employees and gives Duvall the pick sheets, load diagrams, and bills of lading for the shift. The load diagrams, which Foster creates, specify how the trucks are to be loaded both for safety reasons and to ensure that heavy gauge pipe does not bend lighter gauge pipe underneath. The pick sheets specify the exact pipe that the workers in the shipping yard will select for loading. Foster or Bartley also writes the order of the shipments on a board in the shipping supervisor's office that is visible through a window in the office door.

During the shift, Duvall gives the pick sheets to employees Taylor and Hall who work outside in the shipping yard and load the pipe onto a forklift for transportation into the facility. Duvall and Martin then load the pipe onto flatbed trucks for delivery using the loading diagrams provided to them. When the carrier arrives, Duvall ensures that the carrier receives the bill of lading. At the end of the night, pick tickets are left for Foster and the next shipping shift with a bill of lading attached if the shipment was picked up. Although the record is unclear as to the precise number of times it has occurred, if a problem arises during the shift, Duvall has called Shipping Supervisor Foster at home.

The Employer asserts that Duvall exercises independent judgment to responsibly direct the second shift shipping department. In support of this

³ Human Resource Manager Newport occasionally attends the pre-shift meeting.

position, the Employer relies both on Duvall's May 2003 performance appraisal and on the fact that he is the only one present on his shift to direct employees. The May 2003⁴ performance appraisal shows Duvall's classification as utility operator and has spaces for comments on quality of work, volume of work, attitude, job knowledge, and qualifications for utility operators. Under the general comments section for qualifications, first shift Shipping Supervisor Foster noted as follows:

“David as the lead person needs to be more demanding on the people working with him. He needs to insure they are kept busy doing the work assigned by the supervisor and that it is accomplished by the end of the shift. In slow times he needs to see that the yard and inside is kept clean.”

In this regard, the Employer cites *United Electrical & Mechanical Inc.*, 279 NLRB 208, 211 (1986) and *Indian Head Lubricants, Inc.*, 261 NLRB 12, 17 (1982). However, I find these cases are distinguishable. In both cases, the individuals whose supervisory status was in question had a duty to simply “keep people busy,” leaving open the ability for that individual to use discretion or independent judgment. In *United Electrical*, supra, the leadman in question had hired employees, gave 16 to 26 employees daily assignments, and had discretion to move the employees around in order to keep them at work. Such authority provides for more discretion than is the case here. Duvall's authority “to keep employees busy”, as noted in his appraisal, relates to work already assigned by Shipping Supervisor Foster and does not constitute independent judgment.

⁴ The Employer did not offer the performance appraisals that Duvall received in May 2004 and May 2005.

Armstrong Machine Co., 343 NLRB No. 122 (2004) (No independent judgment where foreman performed work similar to that done by others in the department, but also was responsible for ensuring that the other employees remained productive. In making work assignments, the foreman referred and adhered to a priority list generated by management.)

With regard to job assignments, Foster creates the daily work assignments that are distributed at the huddle meetings at the beginning of the second shift. The daily routine of all second shift shipping employees is determined by the orders received from Foster or Bartley at the beginning of the second shift. Duvall is responsible for ensuring that the orders that are scheduled for the night are completed. The evidence fails to show that Duvall uses independent judgment in accomplishing that task. Any assignments he makes in this regard are routine and perfunctory and do not confer supervisory status. *Sears, Roebuck and Co.*, 292 NLRB 753, 754-55 (1989); *Chrome Deposit*, 323 NLRB 961, 963 (1997).

Regarding Duvall assigning clean-up tasks during down time, such authority is routine in nature and is insufficient to show the use of independent judgment by Duvall. In *Azusa Ranch Market*, 321 NLRB 811 (1996), the Board found that “key carrier” Virgen was not a supervisor under the Act although he had the authority to assign employees to fill milk coolers, block shelves, take them on and off register lines, and to sweep and clean. The Board stated that it had found employees with similar assignment authority not to be supervisors in light of the routine nature of the decisions made pursuant to such authority. *Azusa Ranch*, at 812. Duvall’s instructions to clean the shipping yard and Employer’s facility during down time are

analogous to directing employees to stop work and to clean the facility prior to leaving for the night. Where routine work of a repetitive nature is assigned, the Board has held that this is not indicative of supervisory status. *Highland Telephone Cooperative*, 192 NLRB 1057 (1971); *Commercial Fleet Wash*, 190 NLRB 326 (1971).

Further, I note that approximately 9 or 10 second shift employees, including Duvall, received discipline a few weeks before the hearing for overextending the time allotted for a break. Duvall received the same type of discipline as the other employees.⁵ In this regard, I note that Duvall was not admonished for failing to effectively direct his fellow shipping employees at the conclusion of the time allotted for the break. This runs counter to the Employer's position that Duvall is held accountable for the direction of the shipping department. Nor was HR Manager Newport aware of any instance where Duvall has been counseled or warned because the other shipping employees did not perform their jobs correctly.

The Employer argues that the fact Duvall is authorized to require employees to work overtime, demonstrates his use of independent judgment in directing employees. I disagree. Newport testified that Duvall could and has required that employees work beyond their scheduled shift. She explained that if it was the end of the month and an order was not getting out that had a definite deadline, Duvall or Foster could tell employees to work until the job was completed. Newport had no direct knowledge of Duvall requiring shipping

⁵ All employees received a written warning, except for one employee who received a 3-day suspension because he had previously been warned about taking extended breaks.

employees to work overtime and could provide no specific date where Duvall had made such a decision. Regardless, the overtime scenario described by Newport, and the authority exercised by Duvall in those instances, falls within a specified set of parameters already established by management - shipment deadlines. In other words, Duvall is not exercising independent judgment. "The scheduling of overtime, vacations and absences may be a supervisory function if it involves the use of independent judgment. However, if such tasks are carried out within relatively fixed parameters established by management, then their performance is routine and does not indicate supervisory status." *Dico Tire, Inc.*, 330 NLRB 1252, 1253 (2000), citing *Azusa Ranch Market*, *supra*, and *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

Finally, the Employer argues that if Duvall is not a supervisor, then the shipping department is left unsupervised for 6 to 8 hours a day and it is unlikely that an employer would allow such a crucial department to operate under such conditions. This argument fails in light of what occurs when Duvall is absent, the fact that Duvall sometimes calls Foster at home, and the fact Production Supervisor Cowles is present during the shift. Newport testified that when Duvall is absent, the shipping department either operates with one less employee or an employee is borrowed from another department to assist with loading or working out in the yard. So far as Newport could recall, when an employee was borrowed, the replacement did not receive work leader pay for that day. As noted above, Duvall sometimes calls Foster at home to deal with a problem. Duvall also brings matters to the attention of Production Supervisor Cowles. Accordingly, the

evidence establishes that supervision is available to the shipping department which can operate without the immediate presence of its work leader.

B. Recommendations to Hire

Only Human Resource Manager Newport has the authority to hire employees. However, the Employer asserts that Duvall has the authority to effectively recommend hiring employees.

Newport testified that in the past several months, maybe even a couple of years, the majority of employees the Employer has hired at its Glasgow facility have been converted from temporary status into full-time employment. Newport further testified that within the second shift shipping department, Duvall provides the “sole recommendation” as to whether a temporary shipping employee should be hired as a full-time employee or whether his or her employment should be discontinued.

The Employer provided two examples of temporary employees who were hired after Duvall recommended them for full-time employment: George Runion and Aaron Gillespie. Both of these employees began employment around 2002 or 2003 and ended their employment in early 2004.

Newport explained that following receipt of Duvall’s recommendation, she interviews the candidate, conducts a background check, and administers a pre-employment test. Newport testified that if an applicant received an acceptable score⁶ and had received a recommendation from a supervisor, a full-time offer

⁶ The record does not establish what is considered an “acceptable” score or what skill set the test is designed to measure.

would usually follow. In Runion's case, his test score was "borderline" and although Newport had some "misgivings" about Runion, based on Duvall's recommendation, she decided to give Runion a chance. The record does not establish how many temporary second shift shipping employees the Employer has hired over the past couple of years or if temporary second shift shipping employees have been hired without Duvall's recommendation.

Although Newport testified that she considers Duvall's recommendation when making her decision on hiring a temporary employee as full-time, she also acknowledged that Duvall could highly recommend an individual that Newport would decide not to hire. In this regard, Newport subsequently interviews the potential candidate, conducts a background check, and administers a pre-employment test before making her final decision.

Section 2(11) of the Act makes clear that the power to effectively recommend any of the enumerated attributes of supervisory authority is itself an attribute of such authority. The Board defines the power to effectively recommend as meaning that the recommended action is taken with no independent investigation by superiors. *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1991) (LPNs found not to be supervisors notwithstanding they recommended aides for hire, where director of nursing did not rely solely on their recommendations, but independently investigated and interviewed the aides.) The fact that the recommendations were ultimately followed is insufficient. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

Therefore, as Human Resource Manager Newport conducts an independent investigation following Duvall's recommendation, the record does not establish that Duvall's recommendation meets the Board's definition of possessing the authority to effectively recommend hiring.

The Employer also asserts that it has interviewed candidates for employment based on Duvall's recommendation, the last being during the summer of 2004. However, Newport further testified that the Employer considers other employees' recommendations for candidates for hire and that she would not take Duvall's opinion over that of any other employee at the facility. In these circumstances, the record does not establish that Duvall exercises supervisory authority to effectively recommend hire, as opposed to simply referring acquaintances to fill a vacancy, as any employee could do. The Board has held that employees' practice of recommending friends, family members or acquaintances for employment does not itself establish supervisory authority to effectively recommend hiring employees. *Foote's Dixie Dandy, Inc.*, 223 NLRB 1363, 1365 (1976) (employee who recommended family member for employment not a supervisor, where other employees also sought jobs for their acquaintances, whom the manager generally hired.) Further, it is clear from the record that Newport would not weigh Duvall's recommendation greater than any other employee. As such, this evidence is insufficient to establish supervisory status with respect to Duvall's ability to effectively recommend the hiring of an employee.

C. Recommendations to Discipline

Although the Employer acknowledged that Duvall cannot administer formal discipline himself, it asserts that he has the authority to effectively recommend discipline for shipping employees. It notes that Duvall reports infractions to Shipping Supervisor Foster or, if immediate action is required, Duvall goes to second shift Production Supervisor Donnie Cowles. The Employer contends that the supervisors then act upon Duvall's report, subsequently imposing his recommended discipline. However, the record contains no examples where that occurred.

The record does establish that Duvall leaves notes for Foster relating incidents that occurred during the shift or explaining why certain product was not shipped. However, there is no evidence that in these notes Duvall recommended discipline for anyone. Rather, Duvall relayed the occurrence of an event, which would subsequently be investigated by Foster or Bartley. It is well established that merely reporting misconduct does not constitute supervisory authority within the meaning of Section 2(11). *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360 (2000), citing *Ten Broeck Commons*, 320 NLRB 806, 812 (1996).

Newport provided one example where a second shift shipping employee was "counseled" after Duvall left a message. Newport acknowledged that after getting the message, Shipping Supervisor Foster conducted an investigation of the matter and then counseled the employee. The counseling is not part of the Employer's disciplinary procedure. Newport explained that a counseling is a communications tool used to ensure that an individual understands the

requirements of the job. The Employer uses a three-step formal disciplinary procedure that includes a written warning, three-day suspension, and termination. Although the counseling is reduced to writing and placed in the employee's file, there is no evidence that this has an effect on the employee's job status. A counseling reduced to writing is the equivalent of a verbal warning reduced to writing and placed in an employee's file. It is well settled that verbal reprimands that have no clear connection to other disciplinary measures do not constitute discipline within the meaning of Section 2(11) of the Act. *Ken-Crest Services*, 335 NLRB 777, 778 (2001). Here, there is no record evidence that counseling has any effect on an employee's job status.

Newport also testified that if an employee refused Duvall's directive to get back to work, Duvall would advise Foster or Cowles of the situation. If immediate action was required, such as a deadline not being met, Cowles would act on Duvall's word and administer discipline accordingly. She admitted, however, that Cowles might first conduct an independent investigation. Accordingly, Duvall's actions in such a situation would be merely reportorial, similar to leaving notes for Foster or Barkley, communicating incidents to management. Authority to submit reports of employee conduct, which are merely records of infractions or are investigated independently, does not establish supervisory status. *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ohio Masonic Home*, 295 NLRB 390 (1989).

The Employer further argues that Duvall has the authority to verbally correct employees if he finds them neglecting their work or engaging in misconduct and

that this is sufficient to establish that Duvall administers discipline under *West Florida Hospital*, 273 NLRB 1421 (1985). In this regard, Newport testified that if product from the yard was not transferred inside the facility in a timely manner, Duvall would go outside to find out what the delay was and if he found shipping employees “loafing or smoking or doing something that they shouldn’t be doing”, he would tell them to get moving. However, under Board law, the mere authority to issue verbal reprimands is too minor a disciplinary function to constitute statutory authority. *Passavant Health Center*, 284 NLRB 887, 889 (1987), citing *Beverly Manor Convalescent Centers*, 275 NLRB 943, 945 (1985).

The Employer, relying on *Progressive Transportation Services, Inc.*, 340 NLRB No. 126 (2003), argues that Duvall’s discretion in deciding whether an employee’s conduct warrants more serious discipline or whether he should simply handle the matter himself, constitutes the exercise of independent judgment. The record does not support such a conclusion in this case. As stated earlier, under Board law, the ability to issue oral warnings in itself does not demonstrate supervisory authority. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999). Accordingly, exercising discretion not to issue such warnings also would not confer supervisory status.

In *Progressive*, the Board distinguished *Vencor* and *Ken-Crest Services*, 335 NLRB 777 (2001) where it declined to find supervisory status when the verbal warnings did not automatically lead to further discipline. *Progressive*, slip op. at 5. The Board noted that in *Vencor*, there was no evidence that the individuals in dispute ever recommended suspension, as was the case in *Progressive*. *Id.* It

noted that in *Ken-Crest*, the employees in question issued only verbal warnings, and no written warnings were placed in evidence that referenced previous verbal warnings. Therefore, the record did not establish that any actual consequences flowed from the verbal warnings. *Id.*, slip op. at 4. In *Progressive*, the deck lead supervisor in question issued not only verbal warnings, but also written warnings and suspensions. *Id.* Here, Duvall's authority mirrors the facts of *Vencor* and *Ken-Crest*, and is distinguishable from the facts in *Progressive*.

Any lack of evidence in the record is construed against the party asserting supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743 (2001). Therefore, the Employer has not provided sufficient evidence to find that Duvall has the authority to effectively recommend discipline under the Act.

D. Rewarding Employees by Granting Time Off

As to Duvall's authority with respect to granting time off, the record fails to establish that Duvall exercises independent judgment. If an employee is going to be absent and calls in to work prior to 4:30 p.m., the employee seeks approval from Shipping Supervisor Foster. Newport did not know whom the employee would ask after 4:30 p.m.

If an employee is not able to finish working his shift, Newport testified that Duvall would leave Foster a note explaining that an employee wanted to take a no-fault vacation day for the rest of the day and Duvall let him go home. Although this testimony indicates that Duvall can grant permission for employees to leave for the day, the record does not establish that Duvall uses independent judgment in this decision. In addition, Newport's testimony suggests that it is Foster's

determination as to whether the leave will be approved. "Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Therefore, as the record is not conclusive regarding Duvall's authority to approve employee leave, I find that the Employer has not met its burden of proving supervisory status.

E. Secondary Indicia

Duvall receives an hourly wage that is 5 percent greater than the other two full-time regular second shift shipping employees. This amount is less than the additional \$1 per hour that Acting Supervisor Scott Combs receives for his supervisor duties on the third shift. According to the Employer, the difference is attributed to the fact that Combs is the sole "supervisor" on the third shift and Donnie Cowles, second shift Production Supervisor, is present during Duvall's shift. While Duvall is an hourly employee, first shift Shipping Supervisor Mark Foster is salaried. Duvall signs a time card as do all other shipping department employees. He also receives the same benefits as the two full-time second shift shipping employees and, like all other production employees, he receives two weeks vacation following one year of service and an additional two days following five years of service. Finally, Duvall does not attend weekly management meetings.⁷

⁷ Foster is not always present for these meetings, but has been told that he may attend. The record does not establish whether Duvall has received such an invitation.

There is no evidence that Duvall has authority to hire, fire, reward, promote, transfer, layoff or recall employees, or adjust employees' grievances. Absent proof of such primary statutory criteria, secondary indicia is insufficient to support a finding of supervisory status. *Bay Area*, 275 NLRB 1063, 1080 (1985); *Memphis Furniture Mfg. Co.*, 232 NLRB 1018, 1020 (1977); *General Security Services Corp.*, 326 NLRB 312 (1998); and *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). Accordingly, based on the totality of the record, I find that the Employer has not met its burden of proving that David Duvall is a supervisor as defined in Section 2(11) of the Act, and therefore, he is included in the unit found appropriate.

IV. CONCLUSION AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.⁸
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁸ Regarding the introduction of the statement of second shift shipping employee Taylor with regard to Duvall's authority, Union Exhibit 1, I find the document constitutes hearsay and does not fall within any exception. Although the rules of evidence are not strictly applied in these proceedings, I decline to accord the document any weight and do not rely on it in reaching my findings here.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All production, maintenance and shipping employees, including the second shift shipping work leader, employed by the Employer at its Glasgow, Kentucky facility.

EXCLUDED: All temporary employees, office clerical and professional employees, guards, and supervisors⁹ as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

⁹ The parties stipulated and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Assistant to the First Shift Shipping Supervisor Kim Bartley, Acting Third Shift Production Supervisor Scott Combs, Second Shift Production Supervisor Donnie Cowles, First Shift Shipping Supervisor Mark Foster and Quality Auditor Brad Robertson.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to

communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.).

To be timely filed, the list must be received in the Regional Office, The Brinkley Plaza Building, 80 Monroe Avenue, Suite 350, Memphis, TN 38103-2416, on or before **September 27, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008 or at (615) 736-7761 or may be sent by e-mail to

Region26@nlrb.gov or Resnash@nlrb.gov. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **October 4, 2005**. The request may **not** be filed by facsimile.

Dated at Memphis, Tennessee, this 20th day of September 2005.

/S/[Ronald K. Hooks]

Ronald K. Hooks
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